TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 16, 2013

Bridget C. Bohac
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

Re: Application by Gordon Clifford Swenson for TCEQ Registration No. 710926; TCEQ Docket No. 2013-1488-SLG

Dear Ms. Bohac:

I have enclosed the Executive Director's Response to Motion to Overturn. Please let me know if you have any questions.

Sincerely,

Stefanie Skogen
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing list

TCEQ Docket No. 2013-1488-SLG
TCEQ Registration No. 710926

APPLICATION BY GORDON CLIFFORD SWENSON FOR NEW TCEQ REGISTRATION NO. 710926	**§**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S RESPONSE TO MOTION TO OVERTURN

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Motion to Overturn (MTO) the ED's decision to issue TCEQ Registration No. 710926 to Gordon Clifford Swenson. In support of the ED's decision to issue the registration, the ED shows the following:

I. BACKGROUND

The TCEQ received Mr. Swenson's application for new TCEQ Registration No. 710926 to land apply domestic septage on October 9, 2012, and declared it administratively complete on November 14, 2012. The Notice of Receipt of an Application and Declaration of Administrative Completeness was mailed on November 21, 2012. The Amended Notice of Receipt of an Application and Declaration of Administrative Completeness was mailed on November 30, 2012, to provide public notice of the requested increase in the beneficial land application area from approximately 179.4 acres to approximately 298.3 acres. ED staff completed the technical review of the application on February 14, 2013, and prepared a draft permit. The Notice of Public Meeting on an Application for Beneficial Land Application of Domestic Septage was mailed on March 13, 2013. On March 28, 2013, a public meeting was held at the Wilson County Sherriff's Office in Floresville, Texas. The public comment period ended on March 28, 2013. The ED filed his Response to Comment on June 28, 2013. The Office of the Chief Clerk mailed the ED's Response to Comment and registration on July 26, 2013. The MTO period ended on August 19, 2013.

II. LEGAL AUTHORITY

Section 361.011(a) of the Texas Health and Safety Code states that the TCEQ is responsible for managing municipal solid waste.[1] As this responsibility relates to sewage sludge, the TCEQ adopted rules in title 30, chapter 312 of the Texas Administrative Code to regulate sewage sludge in the state. This chapter includes the requirements to apply and issue registrations for the beneficial land application of domestic septage. Under section 312.4(d), no person may land apply sewage sludge[2] for beneficial use before receiving authorization to do so from the TCEQ. Mr. Swenson filed his application to obtain such permission in accordance with section 312.12(b). ED staff then processed the application under section 312.10 and used the information contained in the

[1] For the definition of "municipal solid waste," see section 361.003(20) of the Texas Health and Safety Code.
[2] Under section 312.8(73), the definition of "sewage sludge" includes domestic septage.

application and chapter 312, subchapter B and D requirements to write a registration as required by section 312.12(c).

III. MTO ANALYSIS

A. MTO from Story protestants

The TCEQ received Amy and James D. Story, Jim L. and Joanne Story, Los Senderos Ranch Ltd., Eddie Moore, Cal Taylor, Evergreen Underground Water Conservation District, City of Nixon, and George and Maria Blanch's (Story protestants) MTO on August 16, 2013. The Story protestants raised several issues as the basis for their MTO.

1. ED's Response to Comment

In section IV.1.a and b of their MTO, the Story protestants stated that there is nothing in the application or registration that prevents runoff from leaving the application area. The registration contains multiple provisions to assist with the containment of domestic septage on the application site. For example, section V.D.2 prohibits the application of domestic septage when the land is flooded, frozen, or snow covered. Section VI.A establishes an annual application rate of 76,923 gallons/acre/year, which was calculated to ensure the crops grown on the application site will be able to absorb all nutrients present in the domestic septage. Furthermore, section V.D.9 specifically states that domestic septage must be applied in such a manner to prevent runoff and goes on to list several practices Mr. Swenson must observe to ensure runoff does not occur. The Story protestants have not shown how these provisions are insufficient and, therefore, have not shown that the ED's decision should be overturned based on this issue.

In section IV.1.c of their MTO, the Story protestants stated that the application rate of 6,800 gallons/acre/forty-eight hours stated in section VI.C of the registration exceeds the nitrogen requirement of the crops grown on the application site. They base their argument on the fact that the annual application rate for the site is 76,923 gallons/acre/year. When you convert that to forty-eight hour increments, the result is 422 gallons/acre/forty-eight hours. The annual application rate requirement comes from section 312.43(c) of the TCEQ's rules, which states that the rate is calculated using the amount of nitrogen in pounds per acre *per 365-day period* needed by the crop grown on the land. In other words, the calculation incorporates the amount of nitrogen needed over the course of an entire year. The rule does not require the application rate to be met by dividing the rate by 365 and applying no more than that amount each day. This would not even be practical, as the domestic septage needs to be applied as it arrives at the site. Furthermore, the purpose of the forty-eight hour application rate is to prevent runoff, not to meet a nitrogen application rate requirement. ED staff used the Natural Resources Conservation Service's (NRCS's) formula for calculating the amount of liquid a soil type can absorb before runoff will occur to determine how much domestic septage can be applied and still prevent runoff. Based on those calculations, the application site can receive 6,800 gallons/acre/forty-eight hours. However, Mr. Swenson still must not exceed the annual application rate. Because the Story protestants

have not shown how the forty-eight hour application rate is insufficient, they have not shown that the ED's decision should be overturned based on this issue.

In section IV.1.d and e of their MTO, the Story protestants point to statements in the ED's Response to Comment as evidence that runoff will, in fact, leave the application site and enter water in the state. They stated that there has been no information provided to show how much runoff will occur and that the beneficial application of domestic septage is an uncommon occurrence that is a greater source of pollutants than what they believe to be typical agricultural activities. There is no information in the registration regarding how much runoff will occur because one of the purposes of the registration is to establish best management practices to ensure that *no* runoff will occur. As the ED discussed in the response to section IV.1.a and b above, the registration contains safeguards to prevent runoff. Even if runoff were to occur, such as due to extreme weather, the registration contains requirements that would mitigate the effects. For example, section V.D.9.e requires Mr. Swenson to stop land applying domestic septage if any runoff is observed, and section V.D.3 lists buffer zones that Mr. Swenson must maintain from various features, such as public schools and surface water bodies. The possibility that runoff may occur does not mean that it will occur or, even if it does occur, that it will be harmful to the environment. If Mr. Swenson complies with the registration, the ED has no reason to believe that such harm will occur. As for the comparison between the beneficial land application of domestic septage and other agricultural activities, it is not relevant for the purposes of this registration. The activity at issue in this case is legal as long as the registration holder complies with the laws regulating it. Because the Story protestants have not shown how the registration's runoff provisions are insufficient, they have not shown that the ED's decision should be overturned based on this issue.

2. TCEQ Registration No. 710926

In section IV.2.a of their MTO, the Story protestants stated that a former water body on Mr. Swenson's property must have been filled in and question whether the filling was done legally. While the presence of a water body on an applicant's property is relevant to a registration, whether a former water body on an applicant's property was filled in under a U.S. Army Corps of Engineers permit is not evaluated as part of the application review. Therefore, the Story protestants have not shown that the ED's decision should be overturned based on this issue.

In section IV.2.b of their MTO, the Story protestants stated that the Texas Department of Transportation (TxDOT) map provided as attachment A to the registration does not accurately depict the location and size of the land application site. The ED has reviewed the map and agrees that Mr. Swenson's property's size and location should have been depicted more accurately. The ED recommends that the Commission either remand the case to the ED so the ED can reissue the registration with a corrected map or set this matter on its agenda and reissue the registration with a corrected map during the agenda. Mr. Swenson has provided a corrected map, which is attachment A to this response.

3. Original Application

In section IV.3.a of their MTO, the Story protestants stated that Mr. Swenson did not determine the seasonal high groundwater table as required by section 312.44(g), which requires a seasonal high groundwater table to be a certain depth below the treatment zone based on the soil's permeability. Section 5 of the application's Technical Report requires the applicant to list soils with restrictive characteristics. An applicant would list those types of soils only if they were present at the land application site. Therefore, the absence of a response does not mean that the information was not provided. The presumption without evidence to the contrary is that there was no answer to provide because no such soils exist at the site. This is supported by the NRCS's Custom Soil Resource Report for Wilson County, Texas: Swenson BFU Site dated December 4, 2012, which lists the depth to the water table as more than 80 inches for every type of soil present on Mr. Swenson's property.[3] In other words, the groundwater is more than three feet below the treatment zone, which is required for soil with slower permeability, i.e. less than two inches per hour.[4] Furthermore, Mr. Swenson must meet the requirements of section 312.44(g), which are incorporated in the registration at section V.D.6-7, whether he should have provided an answer to the soils with restrictive characteristics question or not. Because the Story protestants have not shown that Mr. Swenson's groundwater table response is insufficient, they have not shown that the ED's decision should be overturned based on this issue.

In section IV.3.b of their MTO, the Story protestants stated that the "Depth to Groundwater" column was not completed in the table in section 5 of the Technical Report. As stated above, the NRCS's Custom Soil Resource Report for Wilson County, Texas: Swenson BFU Site shows that the depth to the water table is over eighty inches, which is the maximum depth that would be shown in a soil survey. Because the water table information for section 5 is obtained from the soil survey, there were no exact water table depths to enter in the "Depth to Groundwater" column in this case. During their review of the application, ED staff used the NRCS soil report to verify that no water table exists within eighty inches of the soil surface. Because the Story protestants have not shown how the registration is insufficient because the "Depth to Groundwater" column was not completed, they have not shown that the ED's decision should be overturned based on this issue.

In section IV.3.c of their MTO, the Story protestants stated that the Soil Analysis Report, Attachment F to the application, does not show whether the 65-inch soil depths listed in the table in section 5 are actual or maximum depths or how they were derived. The Soil Analysis Report was not used to determine the soil depths listed in the table. The instructions for section 5 tell the applicant to use the appropriate NRCS county soil survey to complete the table. Based on documentation provided with his November 3, 2012, letter to ED staff, it appears that Donald G. Rauschuber, P.E., used the NRCS's Soil Survey of Wilson County dated June 1977 when completing the table. As for the actual or maximum depth, the instructions do not state that the applicant has to indicate whether the depths listed are actual or maximum depths. Because the Story protestants

[3] This report was provided by TCEQ Region 13 staff as an attachment to their November 28, 2012, investigation report for Mr. Swenson's property.
[4] 30 TEX. ADMIN. CODE § 312.44(g)(1) (West 2013).

have not shown how the soil depth information is insufficient, they have not shown that the ED's decision should be overturned based on this issue.

In section IV.3.d of their MTO, the Story protestants stated that the TxDOT map provided as attachment C to the application does not accurately depict the location and size of the land application site. The ED discussed this issue in section III.A.2 above and refers to that discussion in reference to this issue.

In section IV.3.e of their MTO, the Story protestants stated that the Elm Creek floodplain is not depicted on the Federal Emergency Management Agency (FEMA) map, which is attachment D to the application, within Mr. Swenson's property boundary. They expressed concerned that the buffer zone for Elm Creek may not be properly placed due to this lack of information. While the FEMA map does not depict the upper branch of Elm Creek on Mr. Swenson's property, the USGS topographic and NRCS soils maps do, and ED staff used those maps to properly map the upper branch of Elm Creek's buffer zone. Therefore, the Story protestants have not shown that the ED's decision should be overturned based on this issue.

In section IV.3.f of their MTO, the Story protestants stated that Mr. Swenson owns three parcels of land not identified in the application that are connected by a private right-of-way. However, they did not provide any evidence to support this claim, such as appraisal district records, nor did they argue that the three parcels are connected in any way to the property that is identified in the application. Furthermore, the adjacent landowner map in the application shows that all the properties that are contiguous, i.e. that border, Mr. Swenson's property are owned by someone other than Mr. Swenson. Therefore, the Story protestants have not shown that the ED's decision should be overturned based on this issue.

In section IV.4 of their MTO, the Story protestants stated that sufficient action has not been taken to prevent the contamination of neighboring properties from activities engaged in under a current oil and gas lease on Mr. Swenson's property. As stated in Response 19 in the ED's Response to Comment, Mr. Swenson has stated that there is currently no drilling occurring on the land application site. It is possible that there may never be any drilling on the site and, therefore, no need for any provisions in the registration regarding it. The absence of drilling activity also makes it difficult to establish registration conditions when ED staff do not know the extent to which drilling would impact the site. For example, without any wells, there are no well locations to use to determine the extent to which buffer zones may be needed.[5] The Story protestants do not cite to any legal requirement that the oil and gas lease be accounted for in the registration at this time. Therefore, they have not shown that the ED's decision should be overturned based on this issue.

In section IV.5 of their MTO, the Story protestants stated that while the FEMA map that is attachment D to the application shows that the application areas total 179.4 acres, the USGS map attached to the registration as attachment B depicts the same application areas but states that the total application area is 298.3 acres. The Story

[5] The ED notes that the Railroad Commission of Texas requires drillers to protect groundwater by complying with its surface casing requirements. 16 TEX. ADMIN. CODE § 3.13(b) (West 2013).

protestants stated that such discrepancies make it difficult to determine where the 298.3 acres authorized for land application are located. In Item No. 5 of his November 3, 2012, letter, Mr. Rauschuber stated that Mr. Swenson wished to use his entire property minus the buffer zone areas as his land application area. This equals 298.3 acres. Mr. Rauschuber amended section 5.j of the Administrative Report to support his statement. The buffer zones are depicted on the maps he provided with the revised application page and the USGS map that is attached to the registration. The authorized application area is the area not covered by those buffer zones. Therefore, the Story protestants have not shown that the ED's decision should be overturned based on this issue.

The ED recommends that the Story protestants' motion be granted so the TxDOT map that is attachment A to the registration can be corrected.

IV. CONCLUSION

ED staff used the information contained in the application, other information resources, and all applicable rules to develop a registration they believe will protect the environment from the domestic septage that Mr. Swenson intends to apply to his property. This includes preventing runoff into water in the state and minimizing nuisance odors. The MTO filed in this case has not raised any new issues that lead the ED to believe that the registration will fail to protect the environment. However, the ED recognizes that attachment A to the registration should be corrected. Therefore, the ED recommends that the MTO be granted so the TxDOT map that is attachment A to the registration can be corrected.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Zak Covar, Executive Director

Robert Martinez, Director
Environmental Law Division

By:_____
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CERTIFICATE OF SERVICE

I certify that on September 16, 2013, a copy of the foregoing document was sent by first class mail, electronic mail, and/or facsimile to the persons on the attached mailing list.

_____
Stefanie Skogen, Staff Attorney
Environmental Law Division

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TCEQ Docket No. 2013-1488-SLG

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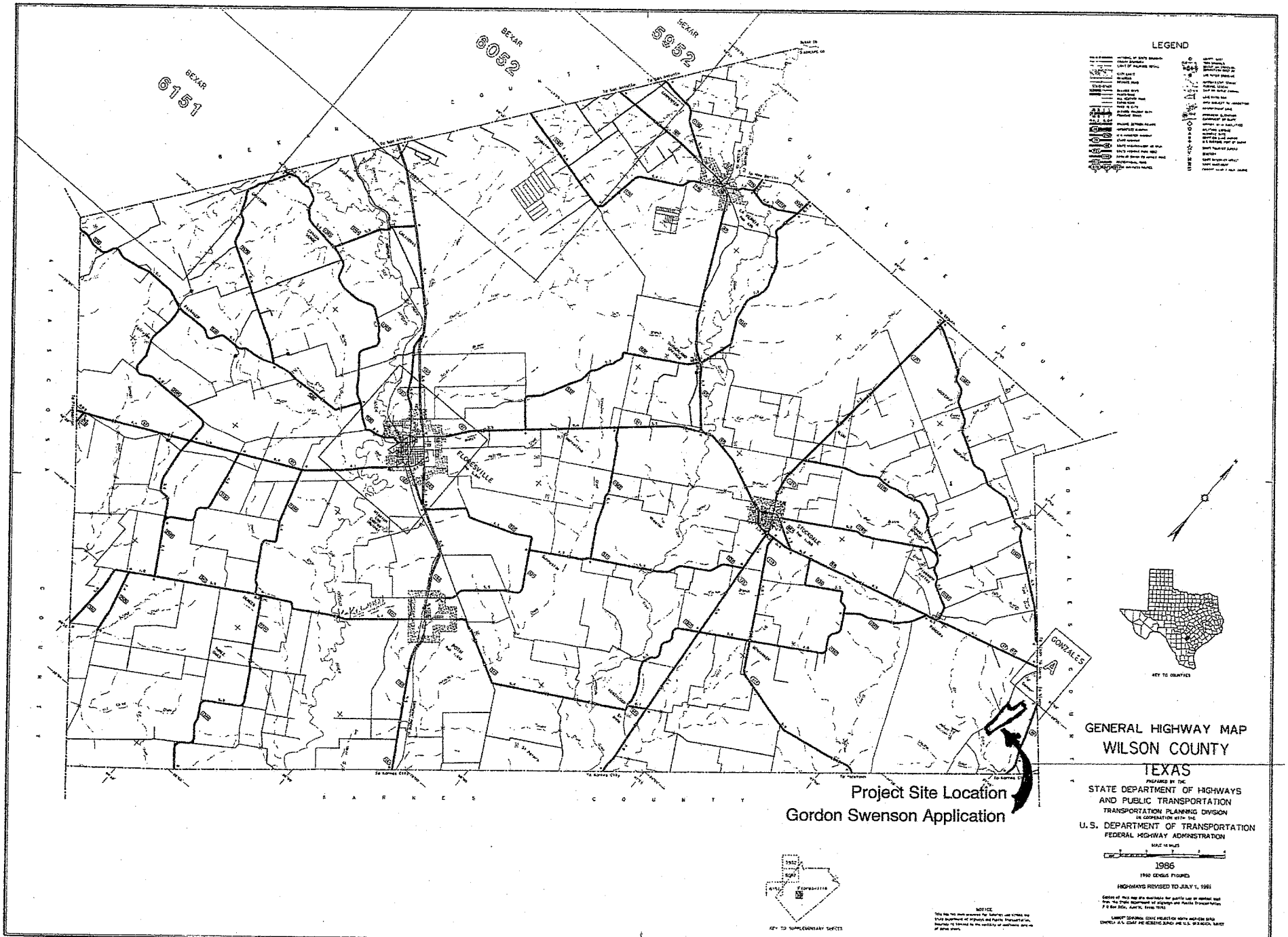
Attachment A


BEXAR
6151
BEXAR
6052
BEXAR
5952
FLORESVILLE
GONZALES
Project Site Location
Gordon Swenson Application
LEGEND
GENERAL HIGHWAY MAP
WILSON COUNTY
TEXAS
PREPARED BY THE
STATE DEPARTMENT OF HIGHWAYS
AND PUBLIC TRANSPORTATION
TRANSPORTATION PLANNING DIVISION
IN COOPERATION WITH THE
U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION
1986
1980 CENSUS FIGURES
HIGHWAYS REVISED TO JULY 1, 1985
NOTICE